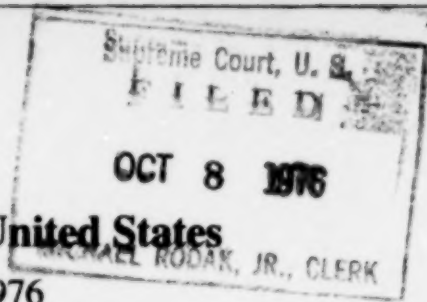


IN THE  
**Supreme Court of the United States**  
October Term, 1976



No. 76-498

Arthur C. Kappelman, ET AL., *Petitioners*  
v.  
Delta Airlines, Inc., A Corporation, ET AL.  
*Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT  
OF COLUMBIA CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT  
OF COLUMBIA CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the opinions and judgments of the United States Court of Appeals for the District of Columbia Circuit, rendered on April 16, 1976 and July 12, 1976 in Arthur C. Kappelman, et al. v. Delta Airlines, Inc. No. 75-1830.

**OPINIONS BELOW**

The opinions of the Court of Appeals, which are not yet reported, are printed as Appendices A and B to this Petition.

**JURISDICTION**

The initial opinion of the United States Court of Appeals for the District of Columbia Circuit was rendered on April 16, 1976. A timely petition for rehearing was denied July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Is this court's recent ruling in *Nader v. Allegheny Airlines, Inc.*, 44 USLW 4803 (US June 7, 1976) properly distinguished upon the grounds stated in the supplemental opinion of the Court of Appeals upon rehearing, namely:

(a) "Nader involved a common law tort action for damages" whereas the instant case involves dismissal of "an action for injunctive relief"; and

(b) the nature of the relief sought—requiring an airline to warn prospective passengers when it is carrying radioactive cargo on a passenger flight—"bring[s] into play considerations of uniformity and agency expertise" unlike "the alleged fraudulent misrepresentations through failure to notify passengers of deliberate overbooking practices" involved in *Nader*.

2. In what way, if at all, does the Federal Aviation Act of 1958, as amended, and the Hazardous Materials Transportation Act of 1975 "abridge or alter" the judicial remedy of injunctive relief to enforce common law duties existent at the time of their respective enactments?

## STATUTORY PROVISIONS INVOLVED

### Federal Aviation Act

#### 49 USC

§ 1421. *Powers and duties of Administrator—Minimum standards; rules and regulations.*

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards . . .

[Here follow specific areas of regulation not here involved in numbered paragraphs (1) through (5).]

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

*Consideration of needs of service; classification of standards, rules, regulations and certificates*

(b) In prescribing standards, rules and regulations and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; . . . The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best

tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation. Pub. L. 86-726, Title VI, § 601, August 23, 1958, 72 Stat. 775.

#### § 1506. *Remedies not exclusive*

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. Pub. L. 85-726, Title XI, § 1106, Aug. 23, 1958, 72 Stat. 798.

### Hazardous Materials Transportation Act

#### 49 USC

#### § 1801. *Congressional declaration of policy*

It is declared to be the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce. Pub. L. 93-633, Title I, § 102, Jan. 3, 1975, 88 Stat. 2156.

#### § 1802. *Definitions*

As used in this chapter, the term—

(2) "hazardous material" means a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce;

\* \* \*

(4) "serious harm" means death, serious illness, or severe personal injury;

Pub. L. 93-633, Title I, § 103, Jan. 3, 1975, 88 Stat. 2156.

#### § 1807. *Transportation of radioactive materials in passenger-carrying aircraft*

(a) *General.* Within 120 days after January 3, 1975, The Secretary shall issue regulations, in accordance with this section and pursuant to section 1804 of this title, with respect to the transportation of radioactive materials on any passenger-carrying aircraft in air commerce as defined in section 1301(4) of this title. Such regulations shall prohibit any transportation of radioactive materials on any such aircraft unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety. The Secretary shall further establish effective procedures for monitoring and enforcing the provisions of such regulations.

(b) *Definition.* As used in this section, "radioactive materials" means any materials or combination of materials which spontane-

ously emit ionizing radiation. The term does not include materials in which (1) the estimated specific activity is not greater than 0.002 microcuries per gram of material; and (2) the radiation is distributed in an essentially uniform manner. Pub. L. 93-633, Title I, § 108, Jan. 3, 1975, 88 Stat. 2159.

#### STATEMENT OF THE CASE

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's dismissal of petitioners' class action complaint, and denied them a preliminary injunction requiring respondent, Delta Airlines Inc., to give "adequate warning of the presence of radioactive materials as defined in § 108(b) of the Hazardous Materials Transportation Act (49 USC § 1807) to all passengers who may be boarding airplanes operated as passenger flights" (JA 5 as amended JA 21, Joint Appendix (JA) to record in Court of Appeals). Petitioners made the following showing:

On April 5, 1974, Arthur C. Kappelmann purchased an airline ticket in Washington D. C. and boarded Delta passenger flight 311 (Boeing 727) on which he travelled from Washington National Airport to Atlanta, Georgia. A few days later, he was contacted by representatives of Delta Airlines who advised him that there had been a radiation leak on his flight; that although there was "nothing to worry about," he should go to Emory University Hospital or to a physician of his choice as soon as possible and that Delta would pay all expenses. He went to Emory and subsequently to other physicians and is still under medical observation.<sup>1</sup>

The circumstances giving rise to this radiation exposure were summarized in the report by the Special Committee on Investigations of the Committee on Interstate and Foreign Commerce, House of Representatives, 93rd Congress, Second Session, December 1974,

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1. The remark in the opinion of the court below that, "No allegation of any ill effects appear in this record" (2a) is incorrect. In his affidavit in support of the motion for preliminary injunction, Mr. Kappelmann stated (JA 25 in the Joint Appendix to the briefs in the Court of Appeals):

"I am advised that as a result of my radioactive exposure on this flight that my chances of developing cancer, leukemia, or perhaps other diseases has been substantially increased. Furthermore, since I have been a heavy and constant air traveller over the last twenty years, in some years being away from home as many as one hundred to one hundred fifty days a year, I believe I may well have been frequently exposed to an indeterminate but considerable amount of radiation during my air travel history without knowing it.

"Because of these circumstances, I am unwilling to incur any further risk of radiation exposure by air travel. Because of the unavailability of reliable information on the carriage of radioactive cargo on passenger flights, I have given up travel by commercial passenger flights entirely. I have not traveled by air since being made

pp. 179-180 (JA 42-43 to briefs in Court of Appeals) in the following language:

**On Friday, April 5, 1974**, a shipment of radioactive material (Iridium 192, used in industry X-ray of materials), consigned from an engineering firm in Virginia to a supplier in Louisiana, was transported on Delta passenger flight 311 (Boeing 727) from Washington National Airport to Atlanta, where it was unloaded and stored overnight in a Delta warehouse.

**On Saturday, April 6**, the shipment was transported on Delta passenger flight 585 (Douglas DC-9) from Atlanta to Baton Rouge, where it was stored in a Delta warehouse over the weekend, picked up and delivered to the consignee on Monday, April 8.

Through detection instruments, the consignee discovered that the shipment was leaking radiation. When the outside container was unpacked, it was determined that the radioactive material was in an unshielded position in the box packed with the container. Investigation by the Office of Hazardous Materials, Atomic Energy Commission (AEC), and FAA determined that the shipment was improperly packed at the engineering company.

A total of 213 persons were possibly exposed to radiation from this shipment including 158 passengers and 55 airline and freight forwarding personnel. . . .

This summary was based largely on Delta's own report to the Committee on Commerce of the United States Senate, pp. 210-217, 343 (June, 1974, Transportation of Hazardous Materials, JA-64-70, Joint Appendix to briefs in Court of Appeals).

#### Unusual Hazard Presented by Carriage of Radioactive Cargo on Passenger Flights

The reason this and another recent radioactive accident on a Delta passenger flight (JA 44) received so much Congressional attention was

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aware of the risk involved, even though I enjoy flying, have myself piloted aircraft, and my ordinary work as a real estate specialist requires me to travel a great deal.

"Nevertheless, I have given up employment which would require air travel, and until such time as I can be reliably informed that my air travel will not involve further risk of exposure to radiation, I do not intend to fly again on commercial passenger airlines."

The expert testimony of Dr. Cecil H. Fox, a research scientist at the National Cancer Institute, details precisely how petitioner's chances of developing cancer or leukemia were substantially increased by his exposure to radiation during the flight from Washington to Atlanta, as well as the increased risk he or anyone else with a previous medical history of radiation exposure incurs by travel on flights carrying radioactive cargo, *even when the materials are properly packaged and handled*. (JA27-39). One is reminded of the stubborn resistance to the scientific bad news born by Dr. Stockman to his fellow townsmen in Ibsen's *Enemy of the People*.

not because Delta had been particularly neglectful in this area. On the contrary, following its first case of radioactive contamination in 1972, Delta took unusual precautions—well beyond those required by the existent regulations—to prevent a recurrence (JA 65-66).

Nevertheless, despite these precautions—which were fully operative in April 1974—a recurrence took place and petitioner and several hundred others were exposed to varying degrees of accidental exposure to radiation.

The reason for Congressional attention to the Delta accidents was because they were dramatic manifestations of an underlying crisis in the air transport of radioactive materials.

In its rejected application to be relieved of the duty of carrying radioactive cargo, Delta stated (JA 71):

Experience has demonstrated . . . that applicable Federal transport regulations . . . are not or cannot be enforced in such a manner as to provide . . . assurance that shippers will in every case properly package and survey such shipments prior to offering them to Delta for transport. . . . Delta cannot be aware of the adequacy of the internal packaging of each shipment. . . .

Recent surveys tend to make Delta's assertion sound like a masterpiece of understatement.

In the December 1974 Report of the House Investigating Subcommittee, *supra* (JA 40), we find:

[A July 1971] interagency study of air shipments of radioactive materials conducted by AEC and HEW in six cities . . . disclosed that of 300 packages inspected, 175 violated FAA regulations (JA 47) citing official GAO report to Congress dated May 1, 1973, entitled "Need for Improved Inspection and Enforcement in Regulating Transportation of Hazardous Materials" (JA 78).

William J. Burns, Director of the Office of Hazardous Materials for the Department of Transportation, at hearings before a subcommittee of the House Committee on Government Operations in April of 1973 (JA 79) provided information of violations of existing regulations which exceeded the number of shipments inspected. Specifically, the DOT's own statistics revealed: 166 violations in a sample of 78 shipments inspected at seven airports in 1972-1973.

At these same hearings (JA 79), the Air Line Pilots Association (ALPA) reported that in over 1,000 on-the-spot surveys of cargo shipments, nine out of every ten of hazardous materials were found to be illegal. These figures and other data led Chairman Brooks to conclude (p. 80):

[O]ur system of regulating the shipment of hazardous materials is totally out of control. (JA-86)

In the legislative history of the Hazardous Materials Transportation Act, it is reported that an FAA survey conducted in early 1974 found "fully 90% of the shipments inspected were in violation of the regulations." Senate Report 93-1192, 93rd Congress, 2d Session, p. 8. See also the statement of Senator Hartke, manager of the bill, in the Senate debate, Congressional Record, S. 18408, October 7, 1974 and hearings (JA 73-77).

The magnitude of this problem is illustrated by the House Investigating Subcommittee report, *supra* (JA 40 et seq.):

In 1973, it was estimated that over 950,000 packages of radioactive material were transported in this country (compared to an estimated 200,000 packages in 1961), of which some 780,000 were carried on aircraft, the majority on passenger planes. *Most of the air shipments are radiopharmaceuticals. . . .* (JA 44), (emphasis added).

Preliminary data from [a 1974 FAA] survey reflects that in passenger operations about three percent of the departures carry hazardous materials and one percent carry radioactive materials. The percentage . . . ranges higher for selected major airports, with a high of 13.2 percent at Newark. (JA 45)

Other data indicates these estimates may be gross understatements. (JA 45-46)

#### Medical Risks Incurred by Passengers on Flights Carrying Radioactive Cargo Assuming Existing Safety Standards Are Scrupulously Observed

On September 17, 1974, the Joint Congressional Atomic Energy Committee issued a report entitled, "Transportation of Radioactive Material by Passenger Aircraft," 93rd Congress, 2nd Sess., which found that even properly packaged shipments expose passengers to excessive doses of radiation since FAA's current per-package limits are ten times too high. pp. 6-9 (JA-80).

On July 30, 1974, the U. S. Atomic Energy Commission recommended reducing the per-package limit from ten to three Transport Indices and totally barring higher emitting non-medical radioactive shipments from passenger carrying aircraft (JA 80-81).

The Senate Report (93-1192), commenting on what became §108 of the Hazardous Materials Transportation Act, explains, p. 35:

The Committee decided not to set specific standards . . . but it reviewed Report No. 1 of the Special Panel to Study Transportation of Nuclear Materials of the Joint Committee on Atomic Energy [GPO, 1974] with favor and draws the Secretary's attention to that report. It concluded that the maximum safe exposure level for radioactive materials should be set at 1 millirem per hour.

The new regulations under this section, Federal Register, April 17, 1975, pp. 17141-17142 leave unaffected the exposure level standards of the old regulations, 14 CFR 103.1 et seq. Note especially the retention, unaffected of §§ 103.19, 103.23, 103.24.

#### REASONS FOR GRANTING THE WRIT

1. Novel extension of primary jurisdiction doctrine results in repeal by implication of equitable remedies and common law duties in apparent conflict with this court's ruling in *Nader v. Allegheny Airlines*.

The opinion of the Court of Appeals enunciates a novel and, petitioners suggest, a dangerous extension of the doctrine of primary jurisdiction directly opposed to this court's recent ruling in *Nader v. Allegheny Airlines*, June 7, 1976, 44 USLW 4803.

Recognizing the innovation it was undertaking, the Court's initial opinion coins its own phrase to describe it:

a doctrine in the nature of primary jurisdiction

Petitioners suggest that this tempting phrase masks the inner reality of the Court's ruling; and that the "bottom line" of that ruling is to prevent any realistic enforcement of common law duties owed by airlines to their passengers which are not embalmed in a regulation of the FAA, CAB or DOT.

The common law duty here involved is a familiar one to airline tort litigation: the duty of an airline to warn passengers of unusual hazards of which it has advance notice—storms ahead, steps, propellers, baggage and dangerous cargoes such as radioactive ones.<sup>2</sup> Describing such a common law duty as "calling . . . for legislative or rulemaking activity" (6a) and "better made on an industry-wide basis in an agency rulemaking proceeding" only testifies to the generality of common law principles. It begs the question:

Is there a common law duty to warn passengers in the circumstances of this case; and if so, is that duty abrogated or modified in any way by the Federal Aviation Act or the Hazardous Materials Transportation Act?

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2. *Fleming v. Delta Airlines*, 359 F. Supp. 339 (SDNY, 1973). *Brown v. American Airlines*, 244 F. 2d 128 (5th Cir., 1957); *Garrett v. American Airlines, Inc.*, 332 F. 2d 939 (5th Cir., 1964); *Strong v. Chronicle Publishing Co.* 34 Cal. App. 2d 235, 93 P. 2d 649 (1939). See also *Falcon v. Auto Buses Internacionales*, 418 F. 2d 673 (5th Cir., 1969), citing *Brown*, supra for the proposition that "the highest degree of care required under Texas law can encompass the duty to warn of foreseeable hazards to passengers"; and *Greyhound Corporation v. Wilson*, 250 F2d 509 (8th Cir., 1958) to the same effect. See also, generally, *Scott v. Eastern Air Lines, Inc.*, 399 F. 2d 14, 20 (3rd Cir. 1968), cert. den. 393 U. S. 979; *Williams v. Transworld Airlines*, 369 F. Supp. 797 (SDNY 1974), aff'd. F. 2d (1/10/75, 2nd Cir.), noting "the responsibility to protect its passengers from danger and inconvenience." See also *Schaller v. Capital Transit Co.*, 99 US App. DC 253, 239 F. 2d 73 (1956).

That is the "controlling legal issue" in this case and while it may not be "wholly unrelated" to determinations by the federal respondents, those agencies charged with administering these statutes have clearly rejected the common law duty to warn as a basis for rulemaking.

No less than in *Nader*, the federal agencies have simply refused to deal with such common law issues as notice and warnings to passengers. On three separate and distinct occasions, both before and after passage of the 1975 legislation, agency respondents have clearly indicated that they do not consider implementation of the common law duty to warn prospective passengers of radioactive cargoes as part of their rulemaking function.

Warnings would cause "unwarranted apprehension among passengers," says the FAA in 1973 (note 23, 14a).

In 1974 the FAA considered and rejected a proposed regulation requiring that the floor of passenger planes be scanned with radiation detection devices before takeoff to determine whether maximum radiation levels were exceeded. The regulation was rejected because "such scanning would produce unnecessary apprehension in the passengers and might result in aircraft delays."<sup>3</sup>

In 1975, after passage of the Hazardous Materials Transportation Act, DOT specifically adhered to these former rulings of FAA in holding Louisiana State regulations requiring warning passengers of the carriage of dangerous substances<sup>4</sup> "inconsistent" with the act and "preempted" under § 122(b) thereof.<sup>5</sup>

The common law rests on exactly the opposite premise that an airline "must not arrogate to itself a decision which rightly belongs to each passenger." *Fleming v. Delta Airlines*, 359 F Supp 339 (SDNY 1973).

2. The question of whether equitable remedies and common law duties were repealed or modified by the Federal Aviation Act or the Hazardous Materials Transportation Act presents an issue of pressing public importance.

The Federal Aviation Act, like the Federal Trade Commission Act, erects the structure of Federal regulation upon an existing system of common law remedies and duties. §1106 (49 USC §1506) proclaims

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3. Page 3, Ruling dated September 22, 1975, Department of Transportation, reproduced as Appendix B to Delta Airlines brief in Court of Appeals.

4. Proposed Rule 5006, Findings and Rationale in Support of Finalized Rule, and Hazardous Substance Hearing, September 19-20, 1975, State of Louisiana, reproduced in Joint Appendix to briefs in Court of Appeals, JA 89.

5. Ruling of DOT September 22, 1975, supra, note 3.

that remedies and duties are in no way "altered or abridged" by federal regulation which provides additional, cumulative remedies. *Nader v. Allegheny Airlines, supra*.

Did Congress when it enacted the Hazardous Materials Transportation Act intend to change all this? Was its passion for "uniformity of regulation" so overwhelming as to result in a repeal of equitable remedies and common law duties by implication?

Petitioners submit that reason and experience are opposed to such a result. Springing from a legislative history highly critical and deeply distrustful of FAA performance in this field, Congress was not about to pin all its hopes on a transfer of FAA powers to DOT which also "must share some of the blame" (Senate Report 93-1192, p. 9. See also the extensive legislative history in the joint appendix in the court below).

Mr. Kappelmann and other persons similarly situated have a common law right to be advised before boarding a passenger flight that their plane is carrying a cargo recognized both by experience and by statute as unusually dangerous. The right to such information, and the equitable remedy to secure it, was expressly reserved to petitioners by § 1106 of the Federal Aviation Act. Congress did not intend to take such right away when it enacted the Hazardous Materials Transportation Act of 1975.

The empty ritual which the Court of Appeals enjoins upon these petitioners—to go before DOT and lobby for a regulation implementing their common law right to notice and warning of an unusual hazard—is a waste of everyone's time, especially since that agency has refused to recognize that common law duty as a basis for rule making on at least three prior occasions.

In no event, as Nader recognizes, could the federal agency dis-pense respondent airline from performing its common law duties, and the circumstance that DOT refuses to add additional duties by regulation cannot possibly raise an inconsistency with judicial enforcement of the common law duty.

#### CONCLUSION

For the reasons stated above, we respectfully pray that the Court grant the writ and reverse the opinions and judgments of the Court of Appeals in the instant cases and reinstate the complaint for injunctive relief in the District Court.

Respectfully submitted,  
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## APPENDIX

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-1830

ARTHUR C. KAPPELMANN, ET AL., APPELLANTS

v.

DELTA AIR LINES, INC., A CORPORATION, ET AL.

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Appeal from the United States District Court  
for the District of Columbia

(Civil Action 74-1679)

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Argued October 17, 1975

Decided April 16, 1976

*Landon Gerald Dowdey*, with whom *Laurence Sarezky*  
and *Lois Goodman*, were on the brief for appellants.

*Robert Reed Gray*, with whom *John E. Güllick, Jr.*, was  
on the brief for appellee, Delta Air Lines, Inc.

Before LEVENTHAL and MACKINNON, *Circuit Judges*,  
and McMILLAN,\* *United States District Judge*  
for the Western District of North Carolina.

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\* Sitting by designation pursuant to 28 U.S.C. § 292(d).

Opinion for the court filed by *Circuit Judge MACKINNON*.

MACKINNON, *Circuit Judge*: This case grows out of the possible exposure of appellant Arthur C. Kappelmann to radiation leaking from an improperly shielded container that was carried in the cargo section of a commercial airliner on which appellant traveled from Washington, D.C. to Atlanta, Georgia on April 5, 1974.<sup>1</sup> Although Mr. Kappelmann was apparently unaware of the radiation danger during the flight, he was contacted several days thereafter by Delta Air Lines' representatives, informed of the incident, and asked to consult a physician at Delta's expense. No allegation of any ill effects appears in the record, but appellant maintains that he is still under medical observation.<sup>2</sup> On November 18, 1974, Mr. Kappelmann and his wife<sup>3</sup> filed suit seeking damages

<sup>1</sup> For a detailed account of the incident, see SPECIAL SUB-COMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTER-STATE AND FOREIGN COMMERCE, 93D CONG., 2D SESS., REPORT ON AIR SAFETY: SELECTED REVIEW OF FAA PERFORMANCE 179-80 (December 1974).

<sup>2</sup> Appellants' Brief at 7.

<sup>3</sup> Although appellants contend in their brief that the district court dismissed a "class action claim for injunctive relief" against Delta, there is no evidence in the record that appellants ever sought, or obtained, a certification of class action, nor does it appear that they have complied with the requirements for class actions set forth in Rule 1-13 of the Rules of United States District Court for the District of Columbia. Rule 1-13 requires that (a) "[i]n any case sought to be maintained as a class action, the complaint shall contain specified information under a separate heading styled 'Class Action Allegations,'" and (b) "[w]ithin 90 days after the filing of a complaint in a case sought to be maintained as a class action, the plaintiff shall move for a certification under Rule 23(c) (1), Federal Rules of Civil Procedure, that the case be maintained as a class action." In view of the fact that plaintiffs have never done either (a) or (b), it seems clear

against Delta and Value Engineering Co. (the shipper), and temporary and permanent injunctive relief against Delta. The suit also named the Department of Transportation, the Civil Aeronautics Board, and the Federal Aviation Administration [hereafter referred to collectively as the federal defendants], as parties defendant.

On July 8, 1975, the trial judge issued an order (1) dismissing the complaint against the federal defendants on the grounds that no relief was sought against them; (2) dismissing the injunctive relief counts of the complaint; and (3) denying plaintiffs' motion for partial summary injunctive judgment or, in the alternative, for a preliminary injunction. This appeal followed.

# I.

The federal defendants in this case have moved to dismiss that portion of the appeal which seeks to reinstate the complaint against them, contending that the ruling of the trial judge was neither a "final decision" within the meaning of 28 U.S.C. § 1291 (1970), nor an appealable interlocutory order under any existing exception to the final judgment rule, and thus that this court has no jurisdiction to hear the appeal as to them. We agree, and grant the motion to dismiss as to these appellees.

As a general rule, an order of the district court may be appealed only if it is a "final decision." 28 U.S.C. § 1291 (1970). A final decision is defined as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Here, the litigation over damages continues, with only the number of

that this case is not a class action. Moreover, a request for certification of the *Penna* case (arising out of the same incident as is the subject of this litigation) as a class action was denied by District Judge Hart on November 6, 1974. *Penna v. Value Engineering Co.*, Civ. No. 74-704 (D.D.C.).

parties having been reduced (and the injunctive relief aspects of the suit eliminated). In such a case involving multiple parties, FED. R. CIV. P. 54(b) provides:

[T]he court may direct the entry of a final judgment as to one or more but fewer than all of the . . . parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates . . . the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the . . . parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating . . . the rights and liabilities of all the parties.

No such express determination and direction was made in this case, and hence an appeal premised on section 1291 must be dismissed. *Turtle v. Institute for Resource Management, Inc.*, 154 U.S.App.D.C. 341, 342, 475 F.2d 925, 926 (1973); 6 J. MOORE, FEDERAL PRACTICE ¶ 54.28 [2], 54.34[2.-2] (rev. 2d ed. 1975).

The only exception to this rule which is possibly relevant on the facts now before us<sup>4</sup> is that provided by 28

<sup>4</sup> Appellants appear to make this argument in propounding a confused theory that failure to obtain a Rule 54(b) certificate "is of no practical consequence" since "the order denying preliminary injunction is ripe for review," citing *Pang Tsu Mow v. Republic of China*, 91 U.S.App.D.C. 324, 326-27, 201 F.2d 195, 197-98 (1952), cert. denied 345 U.S. 925 (1953). Appellants' Reply Br. at 6. The *Pang* case, however, merely observed that no preliminary injunction (which had been granted by the district court in that case) can stand if the complaint itself was faulty, and that therefore an appellate court may, when reviewing the grant of a preliminary injunction, inquire into both the jurisdiction of the district court and the adequacy of the complaint. In the present case there

U.S.C. § 1292(a)(1) (1970), which authorizes appeals from interlocutory orders of the district court "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." See generally 6 J. MOORE, *supra* at ¶ 54.30[2.-1]. Since no injunctive relief was sought against the federal defendants, however, section 1292(a)(1) cannot provide this court with jurisdiction to hear this part of the appeal.

The federal defendants' motion to dismiss the appeal as to them is therefore granted.

## II.

The remaining questions concern the district court's disposition of the requests for injunctive relief. Count 11(4) of the appellants' complaint requested

4) That this court grant temporary and permanent injunctive relief against defendant airline requiring it to give adequate warning of the presence of a significant amount of radioactive materials to (a) all prospective passengers who may be boarding airplanes operated as passenger flights by it and carrying a significant amount of radioactive materials; or, in the alternative (b) all prospective passengers who may be boarding airplanes operated as passenger flights by it and carrying a significant amount of radioactive materials, which passengers have been exposed previously to a significant amount of radiation.

(J. App. 10). The district court dismissed this request for relief chiefly on the ground that the doctrine of primary jurisdiction requires that resort first be made to the administrative agency for relief.

was no injunction sought against the federal defendants, so the fundamental basis for appellate jurisdiction, present in *Pang*, is absent here.

"The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined *some question* or some aspect of some question arising in the proceeding before the court." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958) (emphasis added). Thus, the doctrine has traditionally been applied in adjudicatory situations—that is, where the case raises issues of fact or policy within a particular factual context. For example, the Supreme Court has invoked this doctrine, *inter alia*, where the question before the court was the applicability of a particular tariff to the shipment of a certain commodity,<sup>5</sup> interpretation of a specific collective bargaining agreement,<sup>6</sup> and alleged violations of the anti-trust laws;<sup>7</sup> and in *Nader v. Allegheny Airlines, Inc.*, 167 U.S.App.D.C. 350, 512 F.2d 527, *cert. granted*, 96 S.Ct. 355 (1975), the case cited by the district court here, a division of this court held that it was for the Civil Aeronautics Board and not the court to determine whether intentional overbooking of flights is a reasonable response to the passenger "no-show" problem. In each case, a specific determination of fact or policy was required.

In contrast to these traditional examples of the use of the doctrine of primary jurisdiction, the district court in the instant case held that the doctrine applied in a situation calling not for an adjudication but rather for legislative or rulemaking activity. Appellants here make no specific complaints about the activity or omissions of Delta Air Lines; instead, they appear to be seeking a broad form of relief which amounts to legislation by in-

<sup>5</sup> *United States v. Western Pacific R.R.*, 352 U.S. 59 (1956).

<sup>6</sup> *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946).

<sup>7</sup> See generally 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.06 (1958).

junction, initially limited to one carrier but expected and intended to have sweeping effects on the entire industry. There is no immediate issue of fact or policy to be resolved here, only a demand for a "statement of general or particular applicability and *future effect*," 5 U.S.C. § 551(4) (1970) (emphasis added), which is more properly handled through a legislative-type procedure.

Although we therefore cannot find the classic doctrine of primary jurisdiction applicable in this case, we are of the opinion that the facts support the application of a doctrine *in the nature of primary jurisdiction* more strongly than many of the cases in which the traditional doctrine has been invoked. Primary jurisdiction has usually been invoked in circumstances outlined by the Supreme Court in *United States v. Western Pacific Ry.*, 352 U.S. 59, 64 (1956):

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference v. United States*, 342 U.S. 570.

See also 3 K. DAVIS, *supra* at § 19.01. The traditional doctrine of primary jurisdiction thus is based on two distinct rationales: 1) the desire for uniformity of regulation; and 2) the need for an initial consideration by a tribunal with specialized knowledge. It is our opinion that both reasons for applying a doctrine of this type are

present here to such a degree that this court must overlook the absence of adjudicatory issues and apply the general principles nonetheless.

First, it seems clear that Congress recognized the need for uniformity of regulation in this area when it passed the Hazardous Materials Transportation Act.<sup>9</sup> That statute, which became effective January 3, 1975, was intended "to broaden federal regulatory control over interstate and foreign shipments of hazardous materials by rail and other transportation modes." Section 105 of the Act provides

The Secretary may issue . . . regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, *placarding*, and routing . . . of hazardous materials. . . .

49 U.S.C. § 1804(a) (1974 Supp.) (emphasis added). That this provision was intended to vest in the Secretary or his delegate<sup>10</sup> primary authority to regulate "any

<sup>9</sup> Act of January 3, 1975, Pub. L. No. 93-633, Title I, 88 Stat. 2156, *codified as* 49 U.S.C. §§ 1801-12 (1974 Supp.).

<sup>10</sup> H.R. REP. 93-1083, 93d Cong., 2d Sess. 1 (1974).

<sup>11</sup> Section 103(3) of the Act, 49 U.S.C. § 1802(3) (1974 Supp.), defines "Secretary" as "the Secretary of Transportation, or his delegate." On July 23, 1975, the Secretary of Transportation delegated his powers to make regulations under the Hazardous Materials Transportation Act, with minor

safety aspects of the transportation of hazardous materials" is evident from the plain language of the statute, *supra*, and the legislative history. The Senate Commerce Committee, in reporting out its version of the bill, made the following observation:

The prime difficulty, discussed by almost all of the witnesses in the June 12, 1974, hearing is that the fragmentation of regulatory power among the agencies dealing with [sic] the different modes of transportation blocks a coherent approach to the problem and creates a mass of conflicts of jurisdiction and regulation. The problem is heightened by the fact that most shipments involve more than one mode of transportation and thus are faced with differing regulations and enforcement authorities at different stages of a trip.

S. REP. 93-1192, 93d Cong., 2d Sess. 8 (1974). Section 112 of the Senate bill, later incorporated into the Act by the conference committee,<sup>11</sup> specifically preempted any state or local requirement inconsistent with any requirement of the Act unless "the Secretary determines . . . that such requirement affords an equal or greater level of protection to the public than is afforded by the requirements of this Act or regulations issued under this Act and does not burden interstate commerce." S. 4057, 93d Cong., 2d Sess. § 112(a), (b) (1974).<sup>12</sup> In reporting out that particular section, the Senate committee stated:

exceptions not relevant here, to the Materials Transportation Board. Investigation and enforcement powers were delegated to various agencies. 40 FED. REG. 30821.

<sup>11</sup> H.R. REP. 93-1589, 93d Cong., 2d Sess. 24-25 (1974); S. REP. 93-1347, 93d Cong., 2d Sess. 24-25 (1974). This provision became section 112 of the Act, also. 49 U.S.C. § 1811 (1974 Supp.).

<sup>12</sup> Inasmuch as this case can be disposed of on the issue of primary jurisdiction, we express no opinion on the question of whether section 112 of the Act preempted any *common law*

The Committee endorses the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.

S. REP. 93-1192, *supra* at 37. The conclusion to be drawn from these expressions of congressional intent is that the Hazardous Materials Transportation Act was aimed at a problem created at least in part by the existence of numerous regulatory bodies, and that it seeks to remedy this situation by consolidating the authority to regulate into one agency and thus promoting uniformity of regulation.

Second, the nature of the instant question "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body," *Western Pacific, supra* at 64, for the trial court found that the injunctive relief requested by the appellants "involves both technical and policy questions which have industry-wide application." (J. App. 136). We cannot say that this holding is in error. In order to grant the relief that appellants seek, the court would be required to determine, *inter alia*, how much radioactivity is "significant,"<sup>13</sup> by what means the radioactivity level must be tested, and what constitutes "adequate warning." The injunction which appellants would

right of action which plaintiffs might have. We merely raise the preemption section here as an example of Congress' desire for uniformity of regulation.

<sup>13</sup> Section 108(b) of the Act, 49 U.S.C. § 1807(b) (1974 Supp.), does prohibit materials [excluding research and medical materials] emitting radiation above a specified level from being transported on passenger-carrying aircraft, and thus in a sense defines what level of radioactivity is "significant." But the further question facing the court would be, given that the only radioactive materials which can be transported on passenger flights are those which meet the section 108 standard, at what level of radioactivity must warnings be issued?

have the court fashion here would in effect constitute a regulation covering one phase of the interstate transportation of one group of hazardous materials on one airline. Such determinations are better made on an industry-wide basis in an agency rulemaking proceeding, and this indeed is the choice which Congress has made in enacting the Hazardous Materials Transportation Act.

Our conclusion in this respect is confirmed by the fact that there has been for the past year what is essentially an ongoing rulemaking proceeding on this general subject in which appellants have apparently never participated. The Hazardous Materials Transportation Act,<sup>14</sup> which became effective on January 3, 1975, directed the Secretary of Transportation or his delegate to "issue regulations . . . with respect to the transportation of radioactive materials on any passenger-carrying aircraft in air commerce."<sup>15</sup> The Secretary's authority in this respect is very broad, "including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing . . . of hazardous materials . . . ." <sup>16</sup> Shortly after this Act took effect, the agency then in charge of the carriage of radioactive materials on passenger-carrying aircraft<sup>17</sup> issued a notice of proposed rulemaking on that subject. That notice stated, *inter alia*:

#### PROPOSED RULE MAKING

The Federal Aviation Administration is considering amending Part 103 of the Federal Aviation Regulations to limit the carriage of radioactive materials on passenger-carrying aircraft to those intended for use in, or incident to, research or medical diag-

<sup>14</sup> See note 8 *supra*.

<sup>15</sup> 49 U.S.C. § 1807(a) (1974 Supp.).

<sup>16</sup> *Id.* at § 1804(a) (emphasis added).

<sup>17</sup> The Federal Aviation Administration.

nosis or treatment and to those shipments of radioactive materials that meet requirements in 49 CFR 172 and 173 which exempt them from packaging, marking and labeling requirements for shipment by rail express and which are now exempt from the applicability of Part 103. The proposed amendments would implement section 108 of the Transportation Safety Act of 1974 (Pub. L. 93-633) in the light of views presented by interested persons at a public hearing held by the FAA on January 20, 1975 (40 FR 2607).

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. . . . The proposals contained in this notice may be changed in the light of comments received.

40 FED. REG. 5168 (February 4, 1975). Public hearings were thereafter conducted on this proposal.<sup>18</sup> It would have been appropriate in this rulemaking for the appellants to suggest that regulations be adopted for the industry similar to those which they now request be imposed on Delta Air Lines by injunction. In addition, since the authority to regulate aspects of the transportation of hazardous materials was consolidated in one agency, the Materials Transportation Board [MTB],<sup>19</sup> two other rulemaking procedures have been initiated in which appellants' request for posted notice might have been considered.<sup>20</sup> The fact that appellants have not even tried to

<sup>18</sup> See 40 FED. REG. 17141 (April 17, 1975), which also announces the final regulations.

<sup>19</sup> 40 FED. REG. 30821 (July 23, 1975).

<sup>20</sup> The Hazardous Materials Regulation Board [yet another predecessor to MTB] on June 25, 1975 solicited comments on the merits of various Hazard Information Systems, at least two of which involve placarding. 40 FED. REG. 26688. On September 20, 1975, the MTB extended the deadline for submission of comments in that proceeding from November 5,

raise their issue in any of these proceedings make this court very reluctant to accept their arguments that the agency should now be bypassed. And even if the subject of notice to passengers would not have been accepted by the MTB as properly raised in any of the forgoing proceedings, it is noted that that agency has announced a proposed general consolidation and reorganization of its existing rules,<sup>21</sup> and appellants could petition the agency under 5 U.S.C. § 553(e) (1970) for issuance of an industry-wide rule similar to that which they seek to impose upon Delta by injunction in this proceeding. To the extent that the response of the agency is unsatisfactory, review in federal court is available.<sup>22</sup>

Appellants appear to make two main arguments against use of a doctrine in the nature of primary jurisdiction in this case. First, they cite the dissent of Justice Frankfurter in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 521 (1958), which states:

It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding when the case must eventually be decided on a

1975, to February 5, 1976. 40 FED. REG. 44336. Also, on December 11, 1975, the MTB announced that it was considering amending its current regulations on the carriage of radioactive materials on aircraft to require aircraft operators to perform certain inspection and monitoring of radioactive materials shipments. 40 FED. REG. 57688. The comment period on the proposal ended February 17, 1976, long after oral argument in the present case.

<sup>21</sup> 40 FED. REG. 31767 (July 29, 1975).

<sup>22</sup> 5 U.S.C. § 706(1) (1970). See *Environmental Defense Fund, Inc. v. Ruckelshaus*, 142 U.S.App.D.C. 74, 83, 439 F.2d 584, 593 (1971); *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S.App.D.C. 391, 397, 428 F.2d 1093, 1099 (1970); *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 865 (4th Cir. 1961).

controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.

Appellants do not explain what "controlling legal issue" is present in this case which is "wholly unrelated" to those determinations which the Secretary or his delegate would make. As explained above, we think those determinations are integrally bound up with the legal issues in this case, and so we reject this first argument.

Second, appellants claim that use of the doctrine of primary jurisdiction would be an "empty ritual" here, "where the agency has already expressed its opinion on the precise point raised by the complaint." Appellants' Brief at 25. We disagree. Of the three incidents alleged to constitute an expression of such an opinion, two<sup>23</sup> took place before the enactment of the Hazardous Materials Transportation Act and thus cannot be taken to reflect current policy. The third incident is a determination by the Acting Director of the Materials Transportation Bureau [MTB] of the Department of Transportation that a regulation of the Louisiana Office of Consumer Protection requiring prior notification of passengers boarding commercial passenger-carrying aircraft of the presence

<sup>23</sup> On Sept. 22, 1972, the Civil Aeronautics Board denied a petition for rulemaking on this subject filed by the Aviation Consumer Action Project. See Denial of Petition for Rule Making, CAB Docket No. 24578 (Sept. 22, 1972) [this document appears at J. App. 86-88]. The grounds for the denial were jurisdictional: responsibility to regulate this area was said to rest elsewhere. On May 4, 1973, the Federal Aviation Administration denied a similar petition on the grounds that the problem was not a serious one and that the placarding of aircraft would cause unwarranted apprehension among passengers. Denial of Petition for Rulemaking, FAA Regulatory Docket No. 12033 (May 4, 1973) [J. App. 82-85].

of hazardous materials is inconsistent with the Hazardous Materials Transportation Act.<sup>24</sup>

Initially, we do not believe that determination was a clear expression of policy on the issue before this court. Although the exact provisions of the Louisiana rule are not a part of this record, it can be inferred from the MTB determination that the rule would have conflicted with the purpose of the Hazardous Materials Transportation Act by requiring warning to passengers when the aircraft carried materials regarded as "safe" under federal regulations.<sup>25</sup> It is not necessary to read a total rejection of the idea of passenger warnings into this determination in order to explain it. Moreover, the decision is

<sup>24</sup> Letter of Sept. 22, 1975 from Acting Director Herbert H. Kaiser, Jr., Materials Transportation Bureau, Department of Transportation, to Charles W. Tapp, Director, Louisiana Office of Consumer Protection. [This document appears in Appendix B of the Brief for Appellee Delta Air Lines, Inc.]. It should be noted that the Louisiana regulation was not preempted, but only declared inconsistent: before preemption is decided, further proceedings are necessary to determine (1) whether the rule affords an equal or greater level of protection than the Hazardous Materials Transportation Act, and (2) whether the state rule unreasonably burdens commerce. See 49 U.S.C. § 1811(b) (1974 Supp.).

<sup>25</sup> Although the Congress, in enacting [the Hazardous Transportation Act], required the removal of certain radioactive materials, it expressly provided measures to assure the safe carriage of other radioactive materials on passenger-carrying aircraft. Regulations implementing those measures are in effect. To permit a rule that would give rise to an unwarranted belief that passenger safety is jeopardized when riding in an aircraft carrying radioactive materials that are being carried in compliance with regulations would be inconsistent with the purposes of the Hazardous Materials Transportation Act and the regulations adopted under the authority of that Act.

Letter, *supra* note 24, at 4.

clearly one on federal preemption and shows no intent to reject *per se* the idea of posting passenger warnings.

In any event, we are unwilling to permit appellants to substitute a MTB decision on a particular state regulation for the record that would be developed during a rulemaking proceeding on this subject. To do so would be to "short circuit" the path mandated by Congress and leave the court without the full record of the agency's reasons for refusing to adopt such a regulation, a record which is necessary to the proper resolution of the questions appellants raise.

In conclusion, we hold that the trial judge properly invoked the doctrine of primary jurisdiction. The need for uniformity and a tribunal of special competence have been shown. It also appears that rulemaking is a more appropriate means of resolving the problems presented than is adjudication.<sup>26</sup> Therefore, we affirm dismissal of the requests for injunctive relief.<sup>27</sup> If appellants in the future desire to impose their suggested regulations upon

<sup>26</sup> *Adler v. Chicago & Southern Air Lines, Inc.*, 41 F. Supp. 366 (E.D. Mo. 1941); *cf. Spence v. Baltimore & Ohio R.R.*, 360 F.2d 887 (7th Cir.), *cert. denied*, 385 U.S. 946 (1966).

<sup>27</sup> Having determined that primary resort to the agency is required, we have the further choice of dismissing or staying the proceedings. 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 19.07(2) (1970). We choose to dismiss, since the legislative nature of the remedy requested here makes it difficult if not impossible for us to grant relief without an administrative record. *Id.* An order of the Board will be subject to review in this court, but for now "[w]e believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the . . . complaint should now be dismissed . . ." *Far East Conference v. United States*, 342 U.S. 570, 577 (1952).

any interstate common carrier of this limited category of hazardous materials, they must in the first instance request that the Secretary of Transportation or his delegate undertake a rulemaking procedure under section 105 of the Hazardous Materials Transportation Act, 49 U.S.C. § 1804 (1974 Supp.).

*Judgment accordingly.*

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1830

ARTHUR C. KAPPELMANN, ET AL., APPELLANTS

v.

DELTA AIRLINES, INC., A CORPORATION, ET AL.

Supplemental Opinion on Petition for Rehearing  
(D.C. Civil 74-1679)

Filed July 12, 1976

Before LEVENTHAL and MACKINNON, *Circuit Judges*,  
and McMILLAN,\* *United States District Judge* for the  
Western District of North Carolina.

### ORDER

On consideration of appellants' petition for rehearing,  
it is

ORDERED by the court that the aforesaid petition for  
rehearing is denied, for the reasons stated in the fol-  
lowing supplemental opinion filed this date.

*Per Curiam*: In connection with the petition for re-  
hearing, we have considered the Supreme Court's recent  
decision in *Nader v. Allegheny Airlines, Inc.*, 44 U.S.L.W.

\* Sitting by designation pursuant to 28 U.S.C. § 292(d).

4803 (U.S. June 7, 1976), but find it distinguishable from the instant case. *Nader* involved a common law tort action for damages—for alleged fraudulent misrepresentation through failure to notify passengers of deliberate overbooking practices. The Supreme Court found this type of suit preserved by the saving clause of the Federal Aviation Act, and contemplated by the agency as an alternative to its "denied boarding compensation" regulation. In petitioner's case, by contrast, the damages action against Delta and Value Engineering Co. proceeds below, and has not been disturbed by our ruling. We have merely affirmed the dismissal of the action for injunctive relief against Delta, because this was an attempt to compel the court to fashion a regulation through an injunction when there is an ongoing rulemaking proceeding on the subject before the agency and petitioner has made no appearance therein. In *Nader* the Supreme Court held that the damages action for fraudulent misrepresentation was "within the conventional competence of the courts" with "the judgment of a technically expert body not likely to be helpful in the application of the standards to the facts." 44 U.S.L.W. 4808. In the case at bar we think it critical that the action is for injunctive relief, not damages, and in our view it does bring into play considerations of uniformity and agency expertise.<sup>1</sup>

*Petition for rehearing denied.*

<sup>1</sup> Because of the Supreme Court's reversal of this court in *Nader*, the reference to our *Nader* opinion, 167 U.S.App.D.C. 350, 512 F.2d 527 (1975), which originally appeared following note 7 of our *Kappelman* opinion, has been stricken today by a separate unpublished order. Since our *Nader* opinion was mentioned in *Kappelman* solely as an example of a case where a court had asked an agency to initially decide a question of "fact or policy within a particular factual context," slip op. at 6, it is no longer appropriately cited following the Supreme Court's action.

Supreme Court, U. S.

FILED

DEC 22 1976

MICHAEL ROSS, JR., CLERK

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1976

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No. 76-498

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ARTHUR C. KAPPELMANN, ET UX.,  
*Petitioners,*  
v.  
DELTA AIR LINES, INC., ET AL.,  
*Respondents.*

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On Petition For a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT DELTA AIR LINES, INC.  
IN OPPOSITION TO PETITION FOR  
A WRIT OF CERTIORARI

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**December 22, 1976**

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1976

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No. 76-498

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ARTHUR C. KAPPELMANN, ET UX.,  
*Petitioners,*

v.  
DELTA AIR LINES, INC., ET AL.,  
*Respondents.*

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On Petition For a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT DELTA AIR LINES, INC.  
IN OPPOSITION TO PETITION FOR  
A WRIT OF CERTIORARI

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Delta Air Lines, Inc. (hereinafter "Delta"), respondent herein, prays that this Court will deny the Petition for Writ of Certiorari filed in No. 76-498 on behalf of petitioners Mr. & Mrs. Arthur C. Kappelman. The petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in *Arthur C. Kappelman*,

*et al. v. Delta Air Lines, Inc., et al.*, 539 F.2d 165 (1976)  
(Pet. App. A & B.)<sup>1</sup>

#### JURISDICTION

The opinion of the court of appeals was issued on April 16, 1976. The petition for rehearing filed by petitioners was denied by the court of appeals on July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

#### QUESTION PRESENTED

Respondent Delta disagrees with the petitioners' statement of the question presented and therefore restates it as follows:

Whether, under the circumstances presented, the court of appeals erred in affirming the district court's dismissal of petitioners' request for injunctive relief against Delta on the ground that the doctrine of primary jurisdiction required that resort, in the first instance, should be made to the Department of Transportation.

<sup>1</sup>The court of appeals issued its initial opinion on April 16, 1976, and its supplemental opinion on July 12, 1976, denying the petition for rehearing filed by petitioners. Citations to the opinions below will be to either Appendix A or Appendix B of the Petition in No. 76-498, *e.g.*, "(Pet. App. A., pp. - )." References to material in the printed Joint Appendix will be by page number thereof, preceded by the symbol "J.A.", *e.g.*, "(J.A., p. )." The statutory material appended to this Brief in Opposition will be cited, for example, as "(App. I, p. )."

#### STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, the Hazardous Materials Transportation Act, 88 Stat. 2156, 49 U.S.C. § 1801 *et seq.*, and the Administrative Procedure Act, 80 Stat. 381, 5 U.S.C. § 551 *et seq.*, are set forth in Appendix I hereto, pages 1a-7a, *infra*.

#### STATEMENT

This case arises out of the alleged exposure of Petitioner Arthur C. Kappelmann to radiation claimed to have emanated from an improperly packaged radioactive materials shipment carried in the cargo section of a Delta aircraft on which Mr. Kappelmann traveled from Washington, D.C. to Atlanta, Georgia on April 5, 1974. Although Mr. Kappelmann was apparently unaware of the alleged exposure to radiation, he was contacted shortly thereafter by Delta Air Lines' representatives, informed of the incident and told that, if he desired to consult a physician, Delta would defray the expense of such an examination.

On November 18, 1974, Petitioners, Arthur C. Kappelmann and his wife,<sup>2</sup> commenced this action

<sup>2</sup>As the court of appeals carefully and properly pointed out below, this case is *not* a class action and the district court did not, as discussed *infra*, dismiss a "class action claim for injunctive relief". (Pet. App. A, pp. 2a-3a). Petitioners have never sought, nor obtained, a certification of class action, nor have they complied with the requirements for class actions set forth in Rule 1-13 of the Rules of the United States District

against Delta Air Lines, Inc., Value Engineering Company, the Civil Aeronautics Board, the Department of Transportation and the Federal Aviation Administration concerning this incident. In the complaint (J.A. 5-10), Petitioners seek, *inter alia*, damages against Delta and Value Engineering for alleged injuries resulting from the above-referenced incident in the total amount of \$600,000 and, as against Delta, temporary and permanent injunctive relief requiring Delta to give "adequate warning" of the presence of a "significant amount" of radioactive materials to (a) all prospective passengers who may be boarding airplanes operated as passenger flights by Delta and carrying a "significant amount" of radioactive materials; or, in the alternative, (b) all prospective passengers who may be boarding airplanes operated as passenger flights by Delta and carrying a "significant" amount of radioactive materials, which passengers have "been exposed" previously to a "significant" amount of radiation. (J.A. 10; Pet. App. A, p. 5a.) Delta filed a timely answer to the complaint and, *inter alia*, set forth, as an affirmative defense, that the doctrine of primary administrative jurisdiction was applicable to the injunctive relief sought against Delta. (J.A. 13.)

Petitioners, on April 14, 1975, filed a "Motion for Summary Judgment on Issue of Injunctive Relief or,

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Court for the District of Columbia. Moreover, a request for certification of the *Penna* case (arising out of the same incident as is the subject of this litigation) as a class action was denied by District Judge Hart on November 6, 1974. *Penna v. Value Engineering Co.*, Civ. No. 74-704 (D.D.C.)

Alternatively, for Preliminary Injunction" (J.A. 20) seeking the above-described mandatory injunctive relief, to which motion Delta timely responded and filed its own motion and supporting materials seeking, *inter alia*, dismissal of the injunctive relief counts on the ground that the doctrine of primary jurisdiction requires that plaintiffs resort first to the appropriate administrative agency for relief and that, under the circumstances presented, petitioners' requests for injunctive relief should be dismissed. (J.A. 21.)

On July 8, 1975, the district court, *inter alia*,<sup>3</sup> dismissed the injunctive relief counts of the complaint chiefly on the ground that the doctrine of primary jurisdiction requires that resort first be made to the administrative agency for relief, finding that: (a) Congress, in enacting the Hazardous Materials Transportation Act, had crafted a comprehensive federal scheme for the regulation of hazardous materials transportation which granted extensive investigative, rulemaking, and regulatory authority concerning such transportation to the Secretary of Transportation; (b) although petitioners could petition for a regulation requiring airlines to give the warning sought herein, petitioners had not sought the promulgation of such a regulation; (c) the

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<sup>3</sup>The district court, in addition to dismissing the injunctive relief counts of petitioners' complaint, also granted the motion of the government defendants to dismiss the complaint as to them for failure to state a claim over which the court had jurisdiction or upon which relief could be granted. (J.A. 135).

requested relief involves both technical and policy questions which have industry-wide application; (d) in view of the stated intention of the Congress, set forth in the declaration of policy of the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 (App. I, p. 3a), to improve the regulatory and enforcement authority of the Secretary of Transportation, it should be the agency (the Department of Transportation) charged with carrying out that policy that makes the initial decision whether the dangers and risks involved in the transportation of radioactive materials require that special warnings be posted; and (e) under these circumstances, even if a common-law right of warning under certain circumstances exists, it is proper for the court to allow the agency to resolve the issues first since "the enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . ." *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956)." (J.A. 133-37.)

On review by the United States Court of Appeals for the District of Columbia Circuit, that court affirmed, *inter alia*,<sup>4</sup> the district court's dismissal of

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<sup>4</sup>The court of appeals also granted the government defendants' motion to dismiss the appeal on the grounds that the ruling of the trial judge, dismissing the complaint as to these defendants, was neither a "final decision" within the meaning of 28 U.S.C. § 1291 (1970), nor an appealable interlocutory order under any existing exception to the final judgment rule, and thus the court of appeals did not have jurisdiction to hear the appeal as to them.

the requests for injunctive relief holding that the trial judge properly invoked the doctrine of primary jurisdiction (Pet. App. A, pp. 16a-17a), specifically reaffirming the district court's finding that the need for uniformity (Pet. App. A, pp. 8a-10a) and a tribunal of special competence (Pet. App. A, pp. 10a-11a) had been demonstrated in this case. (Pet. App. A, p. 16a.) In denying petitioners' request for rehearing (Pet. App. B, p. 18a-19a), the court of appeals found this Court's decision in *Nader v. Allegheny Airlines, Inc.*, 44 U.S.L.W. 4803 (U.S. June 7, 1976)<sup>5</sup> distinguishable in that (a) unlike *Nader* (which involved a common law tort action for damages), the *damage action* against Delta and Value Engineering continues to proceed below and was not disturbed by the court's dismissal of the action for *injunctive* relief on the grounds that petitioners were attempting to compel the court to fashion a regulation through an injunction when (i) there is an ongoing rulemaking proceeding on the subject before the agency and (ii) petitioners had made no appearance therein, and (b) contrary to *Nader* (in which this Court held that the damages action for fraudulent misrepresentation was "within the conventional competence of the courts" with "the judgment of a technically expert body not likely to be helpful in the application of the standards to the facts", 44 U.S.L.W. at 4808), this action is for injunctive relief, not damages, and, in

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<sup>5</sup>This Court's decision in *Nader* has not yet appeared in the official reports and, accordingly, citations to that decision will be to *United States Law Week* (U.S.L.W.).

the view of the court of appeals, brings into play considerations of uniformity and agency expertise. (Pet. App. B, p. 19a.)

#### ARGUMENT

This case presents no important question warranting review. It involves only the question whether, in the particular circumstances shown here, the court of appeals correctly affirmed, in accordance with well-established principles of the doctrine of primary jurisdiction, the district court's determination that petitioners' claim for injunctive relief should, in the first instance, be considered by the administrative agency charged by Congress with the primary responsibility for nation-wide regulation of the transportation of hazardous materials. Contrary to petitioners' assertions, the affirmance of the district court's decision was proper under established primary jurisdiction principles, and review should, accordingly, be denied.

As this court has explained previously, the "doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63 (1956). In this regard, the Court has held that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East*

*Conference v. United States*, 342 U.S. 570, 574-75 (1952). This is so, "[e]ven when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common law liability," 44 U.S.L.W. at 4807.

The circumstances giving rise to appropriate invocation of this doctrine were explained succinctly in *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956):

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference v. United States*, 342 U.S. 570.<sup>6</sup>

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<sup>6</sup>As recently as last term in *Nader, supra*, this Court, in paraphrasing *Far East, supra*, confirmed the appropriateness of reference of "specific issues to an agency for initial determination where that procedure would secure 'uniformity and consistency in the regulation of business entrusted to a particular agency' or where

'the limited function of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.'" 44 U.S.L.W. at 4807.

The doctrine of primary jurisdiction is thus based on two distinct rationales: (1) the desire for uniformity of regulation; and (2) the need for an initial consideration by a tribunal with specialized knowledge and expertise. As found by the district court and court of appeals below and will be demonstrated *infra*, both of these reasons for applying this doctrine are present in this case, therefore obviating any need for review of the decision of the court of appeals by this Court.

Turning initially to the need for "uniformity and consistency in the regulation of" hazardous materials transportation, the court of appeals quite properly pointed out that one of the principal reasons that Congress passed the Hazardous Materials Transportation Act, 88 Stat. 2156, 49 U.S.C. §§ 1801-12 (1974 Supp.), was, indeed, to achieve a greater degree of uniformity of regulation in this area.<sup>7</sup> In this vein, the Senate Commerce Committee Report states as follows:

"Title I of the bill draws the Federal Government's now-fragmented regulatory and enforcement power over the movement of hazardous materials in commerce into one consolidated and coordinated effort under the direction of the Secretary of Transportation." S. Rep. No. 93-1192, 93d Cong., 2d Sess. 1 (1974) (emphasis supplied).

Moreover, Section 102 of the Act specifically

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<sup>7</sup>In the words of the court of appeals, "it seems clear that Congress recognized the need for uniformity of regulation in this area when it passed the Hazardous Materials Transportation Act." (Pet. App. A, p. 8a.)

states the intention of Congress to "improve the regulatory authority and enforcement authority of the Secretary of Transportation" in this area, and the House Interstate and Foreign Commerce Committee Report provides that the statute was intended "to broaden federal regulatory control over interstate and foreign shipments of hazardous materials by rail and other transportation modes." H. Rep. No. 93-1083, 93d Cong., 2d Sess. 1 (1974). To that end, Section 105 of the Act provides:

The Secretary may issue . . . regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. *Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate*, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing . . . of hazardous materials . . . . 49 U.S.C. § 1804(a) (1974 Supp.) (emphasis supplied) (App. I, p. 4a).

Furthermore, the Senate Commerce Committee Report reinforces this Congressional concern for more uniform regulation:

The prime difficulty, discussed by almost all of the witnesses in the June 12, 1974, hearing is that the fragmentation of regulatory power among the agencies dealing with [sic] the different modes of transportation blocks a coherent approach to the problem

and creates a mass of conflicts of jurisdiction and regulation. The problem is heightened by the fact that most shipments involve more than one mode of transportation and thus are faced with differing regulations and enforcement authorities at different stages of a trip. S. Rep. 93-1192, *supra*, at 8.

And finally, Section 112 of the Act, initially proposed in the Senate bill, specifically preempts any state or local requirement inconsistent with any requirement of the Act unless "the Secretary determines . . . that such requirement affords an equal or greater level of protection to the public than is afforded by the requirements of this Act or regulations issued under this Act and does not burden interstate commerce." 49 U.S.C. § 1811. In reporting out this particular provision, the Senate Commerce Committee stated:

The Committee endorses the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation. S. Rep. 93-1192, *supra*, at 37.

It is thus evident from these clear expressions of Congressional intent that the district court, initially (J.A. 133-34), and the court of appeals, in affirming (Pet. App. A, pp. 10a-11a), correctly found that the Hazardous Materials Transportation Act was addressed to a problem created, at least in part, by the existence of numerous regulatory bodies, and that Congress sought to remedy this situation by consolidating primary authority to regulate into the Secretary of Transportation or his delegate and thereby

promote uniformity of regulation.

Moreover, assuming *arguendo* that an airline has a duty to warn passengers of "unusual hazards", consideration of the chaos which could result from attempts by various district courts to ascertain whether the transportation of radioactive materials in passenger-carrying aircraft constitutes such an "unusual hazard" (and then to fashion the relief as requested by petitioners)<sup>8</sup> reveals why such a question should not be decided on an *ad hoc* basis by various courts, but instead must be determined in the context of the broader regulatory scheme. Assume, for example, that the district court in this case had made a determination that transportation of x amount of radioactive material presented an "unusual hazard" and granted the requested relief, and that, in another similar case involving Delta, a second court were to determine that only at a level of x + y did carriage of such radioactive material present such a hazard and granted the requested relief accordingly—which order should Delta follow and, more importantly, how could such conflicting technical, factual determinations be reconciled effectively both with themselves and the Department of

<sup>8</sup> As alluded to earlier and discussed in greater detail *infra*, grant of petitioners' requested relief would have required the district court to determine, in addition, what constitutes an "adequate warning", a "significant amount of radioactive material", and how much such material constitutes "enough" so as to present a "risk of serious harm to humans", thus creating additional opportunities for inconsistency and disparate requirements.

Transportation's regulatory scheme without prior resort to the Department? Furthermore, the "standard" would be applicable to Delta alone and no other airline would be bound because of the *ad hoc* nature of each determination. The potential for such varying standards is obvious and this is clearly the reason that Congress decided that an expert regulatory body, the Department of Transportation, should make the initial determination as to whether the carriage, on passenger-carrying aircraft, of radioactive materials used in research or medical diagnosis or treatment poses an "unreasonable hazard to health and safety", 49 U.S.C. § 1807, and why the invocation of the doctrine of primary administrative jurisdiction in order to maintain *uniformity* of regulation of the transportation of hazardous materials throughout the Nation was particularly appropriate in this case.

With regard to the question of the need for technical expertise, the court of appeals correctly affirmed the trial court's finding that the injunctive relief requested by the petitioners "involves both technical and policy questions which have industry-wide application" (J.A. 136), and properly held that the requested relief "requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body". (Pet. App. A, p. 10a.) In this regard, it would be hard to imagine a more appropriate case for such referral than the case presently before this Court in which petitioners requested the district court (a) to make a threshold determination that the

carriage of radioactive materials aboard passenger-carrying aircraft constitutes an "unusual hazard" requiring the requested relief,<sup>9</sup> and (b) then, for the purposes of granting relief, to determine, *inter alia*, what constitutes an "adequate warning," "enough radioactive material to present a risk of serious harm to humans in the event of emanation or leakage," or "a significant amount of radiation" (J.A. 20). Such questions, which raise "issues of fact not within the conventional expertise of judges", 342 U.S. at 574, are exactly the ones this Court has stated are better left to "agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." 342 U.S. at 575.

As properly pointed out by the court of appeals, the injunctive relief sought by petitioners "would, in effect, constitute a regulation covering one phase of hazardous materials on one airline. Such determinations are better made on an industry-wide basis in an agency rulemaking proceeding, and this indeed is the choice which Congress has made in enacting the

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<sup>9</sup>Section 108 of the Hazardous Materials Transportation Act specifically provides that the Secretary of Transportation shall issue regulations prohibiting the transportation of radioactive materials on passenger-carrying aircraft *unless* "the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment" and *only if* "such materials as prepared for and during the transportation *do not pose an unreasonable hazard to health and safety.*" 49 U.S.C. § 1807 (emphasis added) (App. I, p. 5a).

Hazardous Materials Transportation Act.” (Pet. App. A, p. 11a).<sup>10</sup>

Thus, the court of appeals’ determination that the need for uniformity and a tribunal of special competence have been shown in this case is well founded and fully supported. Consequently, under the circumstances presented by this case, that court’s affirmance of the district court’s invocation of the doctrine of primary jurisdiction is eminently correct, and, therefore, presents no issue warranting review by this Court.

In view of the compelling nature of the need for use of the doctrine of primary jurisdiction in this case, it is not surprising that petitioners were forced to resort to confused, and somewhat tortured,

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<sup>10</sup>In this regard, as noted by the court of appeals (Pet. App., pp. 11a-13a), to the extent that the Kappelmanns sincerely desire to have the requested relief imposed, they have failed to participate in at least three separate rulemaking proceedings conducted by the Department of Transportation in which petitioners’ request for posted notice might have been considered. Under these circumstances, the court of appeals was quite properly reluctant to acquiesce in petitioners’ suggestion that the agency should now be bypassed. (Pet. App., pp. 12a-13a.) Moreover, petitioners could petition the agency under 5 U.S.C. § 553(e) (1970) (App. I, p. 1a-2a) for issuance of an industry-wide rule similar to that which they seek to impose upon Delta by injunction in this proceeding. To the extent that the response of the agency is unsatisfactory, review in federal court is available. 5 U.S.C. § 706(1) (1970) (App. I, p. 2a-3a). See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

arguments in support of review. As will be demonstrated below, however, these arguments are without merit and, therefore, the issues presented should not be reviewed by this Court.

First, the decision of the court of appeals to invoke the doctrine of primary jurisdiction is not “directly opposed” to this Court’s ruling in *Nader, supra*. The *Nader* decision held only that “under the circumstances of this case,” 44 U.S.L.W. at 4804, a common law tort action seeking damages based on alleged fraudulent misrepresentation by an air carrier subject to regulation by the Civil Aeronautics Board should not be stayed pending reference to the Board for a determination whether the practice is “deceptive” within the meaning of Section 411 of the Federal Aviation Act of 1958, as amended, 72 Stat. 769, 49 U.S.C. § 1381. (App. I, p. 6a-7a.) In so holding, the Court merely determined that Section 411 of that Act does not provide the Board with authority to immunize carriers from common law liability and that, under the particular circumstances presented in the *Nader* case, considerations of uniformity in regulation and of technical expertise did not call for prior reference to the Board.<sup>11</sup>

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<sup>11</sup>More specifically, the Court noted that (a) the *damage* action brought by petitioner does not turn, for example, on a determination of the reasonableness of a challenged carrier practice (a determination which, the Court states, could be facilitated by an informed evaluation of the economics or technology of the regulated industry), and (b) the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts in that case. 44 U.S.L.W. at 4808.

The *Nader* decision is distinguishable from the instant case on several grounds and, therefore, the decision of the court of appeals does not "directly conflict" with *Nader*. Initially, it is important to note that, contrary to Section 411, the Hazardous Materials Transportation Act does authorize the Secretary of Transportation, based upon appropriate findings, to grant the relief requested by petitioner herein and, as discussed *supra* and properly pointed out by the court of appeals, petitioners have never made an appearance in the various rulemaking proceedings on this subject conducted, contemporaneously with the pursuit of this litigation in the courts below, by the Department of Transportation under this authority. Moreover, in contradistinction to the *Nader* case in which dismissal of the damage action was sought and rejected by this Court, the court of appeals herein merely affirmed, after determining the need for resort to an expert agency, the dismissal of the action for *injunctive* relief against Delta<sup>12</sup>—the damages action against Delta and Value Engineering proceeds below and was not disturbed by the court's ruling. And finally, as held by the court of appeals, petitioners' request for *injunctive* relief brings into play important considerations of uniformity and agency expertise, found by this Court not to be

<sup>12</sup>See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 222-23 (1966) (in which this Court discussed the particular need for resort, in the first instance, to an administrative agency in cases concerning requests for *injunctive* relief involving subject matter within that agency's specialized field).

present in *Nader* (Pet. App., p. 19a), which require invocation of the doctrine of primary jurisdiction.

Second, rather than the "dangerous extension of the doctrine of primary jurisdiction" bemoaned by petitioners, the court of appeals' use of the doctrine of primary jurisdiction in this case was most appropriate, particularly in view of the broad nature of the *injunctive* relief sought by petitioners. Moreover, as pointed out *supra*, petitioners have not "lost" any common law rights or duties, such as they may be, for the Secretary of Transportation, or his delegate, has ample authority to grant the relief requested.

And finally, petitioners' claim that the decision of the court of appeals results in repeal or modification of equitable remedies and common law duties reflects a misunderstanding of both that court's decision and the reasons underlying the use, by courts, of the doctrine of primary jurisdiction.<sup>13</sup> Initially and contrary to petitioners' contentions, the

<sup>13</sup>Indeed, application of the doctrine in the circumstances here presented is hardly "novel", for this Court, speaking through Justice Brandeis in 1922, stated that the determining factor in deciding to invoke the doctrine of primary jurisdiction is ordinarily not the character of the function administrative or adjudicative, but the character of the controverted question and the nature of the inquiry necessary for its solution, specifically noting that preliminary resort to the specialized agency is required in cases concerning the reasonableness of a future practice, such as that requested by petitioners herein. *Great Northern Ry. Co. v. Merchants Elevator Company*, 259 U.S. 285, 291 (1922).

court of appeals merely found that, under the particular circumstances of this case and in consideration of the nature of the remedy requested by petitioners, the demonstrated need for uniformity and a tribunal of special competence required invocation of the doctrine of primary jurisdiction and consequent consideration by the Secretary of Transportation of the issues raised by petitioners' requested relief.<sup>14</sup> Thus, rather than repealing equitable remedies and common law duties, the court was merely striking the proper balance, given the relief requested, between the relative responsibilities

<sup>14</sup>In this regard, petitioners' assertions (Pet. at 9) that the agencies charged with administering the Federal Aviation Act and the Hazardous Materials Transportation Act have clearly rejected the common law duty to warn as a basis for rule-making and referral would constitute an "empty ritual" are erroneous. As noted by the court of appeals, two of the instances cited took place before the enactment of the Hazardous Materials Transportation Act and thus cannot be taken to reflect current policy. With regard to the third instance cited to the court of appeals by petitioners, the court stated that it did not believe this determination to be a clear expression of policy on the issue before the court and that, in any event, it was unwilling to permit petitioners to substitute a decision by the Materials Transportation Board on a particular state regulation, for the record that would be developed during a rulemaking proceeding on the subject. (Pet. App., p. 16a.) And finally, as to the instance raised for the first time in petitioners' petition to this Court (the scanning of passenger plane floors with radiation detection devices), this incident also took place before the enactment of the Hazardous Materials Transportation Act and thus, as noted by the Court of Appeals as to the other incidents cited by petitioners, cannot be taken to reflect current policy and, in any event, did not involve the question of passenger notice raised by petitioners' requested relief.

and abilities of the court and the Secretary of Transportation under the Hazardous Materials Transportation Act—the touchstone of the doctrine of primary jurisdiction.

Indeed, it was only because the court of appeals, in its discretion and after evaluating the needs of this particular case, properly affirmed dismissal (rather than deferral) of the injunctive relief requests, that petitioners can even raise an allegation that this determination "repealed" equitable remedies or common law duties. Contrary to petitioners' contention, the dismissal was neither a determination nor an abrogation of such remedies or rights.

Once having determined that primary resort to an agency is required, a court, in a proceeding in which the doctrine of primary jurisdiction is properly invoked, has the choice, based upon the particular circumstances presented, of dismissing or staying the proceedings.<sup>15</sup>

In the instant case, the court of appeals properly dismissed the requests for injunctive relief since (a) the nature of the remedy requested made it difficult, if not impossible, for the court to grant relief without an administrative record,<sup>16</sup> and (b) no party would be prejudiced thereby since, rather than being an empty "ritual", the Secretary of Transportation

<sup>15</sup>3 K. Davis, *Administrative Law Treatise* § 19.07(2) (1958).

<sup>16</sup>Pet. App., p. 16a; 3 K. Davis, *Administrative Law Treatise* § 19.07(2) (1958).

or his delegate, unlike the situation in *Nader*, has full authority upon a proper showing to grant the requested relief (and, if petitioners seek such relief and make appropriate showings, may in fact grant that relief), and any determination made with regard to that relief would be subject to review. Thus, rather than repealing "equitable remedies and common law duties",<sup>17</sup> the court of appeals merely found that no purpose will here be served to hold the present action in abeyance in the District Court while the proceedings before the Secretary of Transportation and subsequent judicial review or enforcement of his order are being pursued, correctly noting that "a similar suit is easily initiated later, if appropriate", and properly holding that "[b]usiness-like procedure counsels that the ... complaint should now be dismissed."<sup>18</sup> (Pet. App., p. 16a).

In summary, petitioners have simply failed to demonstrate that this case is within the Court's guidelines for granting writs of certiorari and, therefore, there is no basis for granting such a writ; there is here no special or important reason for grant of a writ; there is here no conflict with the decision

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<sup>17</sup>If the court had found that "equitable remedies and common law duties" had been repealed or modified by these Acts, there would obviously have been no reason to consider whether the proceedings should be stayed or dismissed.

<sup>18</sup>See *Far East Conference v. United States*, 342 U.S. 570, 577 (1952) (dismissal appropriate when no party is prejudiced thereby).

of another court of appeals; there has been no departure from the accepted and usual course of judicial proceedings; and, contrary to petitioners' assertions which were disposed of *supra*, there is here presented neither any conflict with a decision of this Court on a federal question nor any important question of federal law which has not been, but should be, settled by this Court. Petitioners are, in short, merely disappointed appellants seeking another hearing. Accordingly, a writ should not issue.

#### CONCLUSION

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that the petition for certiorari should be denied.

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**December 22, 1976**

## APPENDIX

### APPENDIX I

#### STATUTES INVOLVED

I. Administrative Procedure Act, 80 Stat. 381, as amended, 5 U.S.C. § 551 *et seq.*

##### A. Section 553

###### RULE MAKING

“(a) This section applies, according to the provisions therefor, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) references to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate

in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

(80 Stat. 383, 5 U.S.C. § 553)

#### B. Section 706

##### *Scope of Review*

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

(80 Stat. 393, 5 U.S.C. § 706)

## II. The Hazardous Materials Transportation Act, 88 Stat. 2156 *et seq.*, 49 U.S.C. § 1801 *et seq.*

### A. Section 102

#### DECLARATION OF POLICY

It is declared to be the policy of Congress in this title to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.

(88 Stat. 2156, 49 U.S.C. § 1801)

### B. Section 104

#### DESIGNATION OF HAZARDOUS MATERIALS

Upon a finding by the Secretary, in his discretion, that the transportation of a particular quantity and form of material in commerce may pose an unreasonable risk to health and safety or property, he shall designate such quantity and form of material or group or class of such

materials as a hazardous material. The materials so designated may include, but are not limited to, explosives, radioactive materials, etiologic agents, flammable liquids or solids, combustible liquids or solids, poisons, oxidizing or corrosive materials, and compressed gases.

(88 Stat. 2156, 49 U.S.C. § 1803)

*C. Section 105*

REGULATIONS GOVERNING TRANSPORTATION  
OF HAZARDOUS MATERIALS

“(a) GENERAL. The Secretary may issue, in accordance with the provisions of section 553 of title 5, United States Code, including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials.

(b) COOPERATION. In addition to other applicable requirements, the Secretary shall consult and cooperate with representatives of the Interstate Commerce Commission and shall consider any relevant suggestions made by such Commission, before issuing any regulation with respect to the routing of hazardous materials. Such Commission shall, to the extent of its lawful authority, take such action

as is necessary or appropriate to implement any such regulation.

(c) REPRESENTATION. No person shall, by marking or otherwise, represent that a container or package for the transportation of hazardous materials is safe, certified, or in compliance with the requirements of this Act, unless it meets the requirements of all applicable regulations issued under this Act.

(88 Stat. 2157, 49 U.S.C. § 1804)

*D. Section 108*

TRANSPORTATION OF RADIOACTIVE  
MATERIALS ON PASSENGER-CARRYING  
AIRCRAFT

(a) GENERAL. Within 120 days after the date of enactment of this section, the Secretary shall issue regulations, in accordance with this section and pursuant to section 105 of this title, with respect to the transportation of radioactive materials on any passenger-carrying aircraft in air commerce, as defined in section 101(4) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (4)). Such regulations shall prohibit any transportation of radioactive materials on any such aircraft unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety. The Secretary shall further establish effective procedures for monitoring and enforcing the provisions of such regulations.

(b) DEFINITION. As used in this section, “radioactive materials” means any materials or combination of materials which spontaneously emit ionizing radiation. The term does not include materials in which (1) the estimated specific activity is not greater than 0.002 microcuries per gram of material; and (2) the radiation is distributed in an essentially uniform manner.

(88 Stat. 2159, 49 U.S.C. § 1807)

E. Section 112

RELATIONSHIP TO OTHER LAWS

(a) GENERAL. Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this title, or in a regulation issued under this title, is preempted.

(b) STATE LAWS. Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this title, or in a regulation issued under this title, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this title or of regulations issued under this title and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

(c) OTHER FEDERAL LAWS. The provisions of this title shall not apply to pipelines which are subject to regulation under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. 1671 et seq.) or to pipelines which are subject to regulation under chapter 39 of title 18, United States Code.

(88 Stat. 2161, 49 U.S.C. § 1811)

III. The Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. § 1301 et seq.

A. Section 411

METHODS OF COMPETITION

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it

considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

(72 Stat. 769, 49 U.S.C. § 1381)